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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

XIMPLEWARE CORP., a California)	
corporation,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 13-05160 SI
)	
VERSATA SOFTWARE, INC., f/k/a)	
TRILOGY SOFTWARE, INC., a)	
Delaware corporation; TRILOGY)	
DEVELOPMENT GROUP, INC., a)	
California corporation;)	
AMERIPRISE FINANCIAL, INC., a)	
Delaware corporation; and)	
AMERIPRISE FINANCIAL SERVICES,)	
INC., a Delaware corporation,)	
)	
Defendants.)	
)	

San Francisco, California
Wednesday, December 4, 2013

TRANSCRIPT OF PROCEEDINGS

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REPORTED BY: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

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Wednesday - December 4, 2013

11:12 a.m.

P R O C E E D I N G S

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THE CLERK: Calling Civil 13-5160, XimpleWare versus Versata.

Please state your appearances.

MR. RUSSO: Thank you. Jack Russo of Computerlaw Group, and with me is Ansel Halliburton as well, representing plaintiff XimpleWare.

THE COURT: Okay. Good morning.

MR. RUSSO: Good morning, Your Honor.

MR. ALAVI: Good morning, Your Honor. Amir Alavi and I won't give you the full firm name. It's AZA Law is the shorthand. I'm here with Ben Foster and Dave Bohrer on behalf of the Versata defendants.

THE COURT: And your last name is?

MR. ALAVI: Alavi, A-L-A-V, as in Victor, I.

THE COURT: All right.

MR. TAMKIN: Good morning, Your Honor. Dave Tamkin of the law firm of Dorsey & Whitney on behalf of the Ameriprise defendants.

THE COURT: Good morning.

Have I got everybody?

MR. ALAVI: Yes, Your Honor.

THE COURT: Okay. So what we are on for today is

1 XimpleWare -- that's how we say it -- XimpleWare's motion for a
2 TRO and for preliminary discovery or expedited preliminary
3 discovery, and there's been now quite a lot of paperwork filed.

4 My first question, I guess, to you, Mr. Russo, is whether
5 you feel like the representations and undertakings that Versata
6 has presented will reduce or eliminate the problem you see.

7 **MR. RUSSO:** Your Honor, we welcomed what they did;
8 however, they did not say that it has been effective, and I
9 searched --

10 **THE COURT:** Let's say they were to.

11 **MR. RUSSO:** If they were to say it's been effective
12 and Ameriprise has, in fact, installed the patch, the one
13 continuing issue we have, and there's not been a single mention
14 of it in any of their papers, is what they did in removing our
15 copyright notice, and they don't at all address that issue.

16 They took our copyright notice out of the software. They
17 created a number of copies and distributed, and their clients,
18 customers, Ameriprise, in turn made a number of copies without
19 our copyright notice. That means they're circulating now
20 without our copyright notice and thereby setting up the
21 potential for other persons who could claim innocent
22 infringement or innocence defense.

23 They would have to then send out patches that say, "On all
24 the software that you have that has the XimpleWare software,
25 you have to install this patch that reinserts the copyright

1 notice because, in fact, we took that out."

2 They should not have done that. It was a wrongful act.
3 It, in fact, in our view, takes them entirely outside the
4 benefits, any potential benefits, of the license that was
5 available under the GPL.

6 **THE COURT:** So your concern, then, is that if they do
7 what they say they will do or can do or have done, if they do
8 that and it's effective, and then in addition if they
9 communicate with prior customers to whom they've sent this
10 program and send them a patch that will reactivate the
11 copyright notification, if all of those things happen, will the
12 immediate issue that you're concerned about have been dealt
13 with?

14 **MR. RUSSO:** Yes.

15 **THE COURT:** Okay. Who's -- are you Versata?

16 **MR. ALAVI:** Yes, Your Honor.

17 **THE COURT:** Okay. So how hard would it be to send out
18 this patch re-introducing or re-upping the copyright notice?

19 **MR. ALAVI:** Well, I don't know the answer to that
20 question because the copyright notice has never been removed
21 from the XimpleWare software.

22 **THE COURT:** Okay. So tell me about that.

23 And you listen and you tell me if you disagree with what
24 he's saying.

25 **MR. ALAVI:** So let me say this: If you look through

1 Mr. Russo's papers, which we've done, there is not a single
2 citation to a single bit of evidence that Versata has removed
3 the copyright notice from the XimpleWare software.

4 **THE COURT:** Look, I think that we are doing this on a
5 very rapid turnaround, and I think the evidence on both sides
6 is nonexistent, so I'm not concerned about evidence. I want to
7 know what his real concern is and what your representation is
8 that your client can do or has done.

9 **MR. ALAVI:** And, so, the reason I raise that is
10 because this is a red herring. My client, and we've looked
11 into this, and Mr. Foster is helping with this, has never
12 removed any copyright notice from any XimpleWare software.

13 **THE COURT:** Did you know that, Mr. Russo?

14 **MR. RUSSO:** No, Your Honor. I've been told the
15 opposite.

16 **THE COURT:** You have been told the opposite?

17 **MR. RUSSO:** I've been told the opposite.

18 **THE COURT:** By whom?

19 **MR. RUSSO:** We asked, in fact, for some information
20 from Ameriprise, we asked for what's the situation in terms of
21 copyright and copyright notice. We were told, "We don't have a
22 copyright notice. We can't see a copyright notice." That's
23 what we were told.

24 Now, if they want to say that they can prove or show us
25 that all these copies that were sent out included our copyright

1 notice, fine. That's a simple thing for them to do, in which
2 case they clearly have our copyright notice.

3 **THE COURT:** Okay. So you say you didn't take it out,
4 so then you'd be able to do that --

5 **MR. ALAVI:** Well, yes; and I don't think we --

6 **THE COURT:** -- if you have to.

7 **MR. ALAVI:** Let me take a step back because I think
8 Mr. Russo needs to delve into how the software works.

9 The copyright notice is contained in the source code.
10 What was delivered to Ameriprise was object code, was the
11 XimpleWare object code. So, of course, when Ameriprise goes
12 and looks at the object code, they're not going to see the
13 copyright notice because the copyright notice is contained in
14 the source code. So this is, again, a red herring.

15 Now, I don't know if Ameriprise's lawyer, in fact, told
16 Mr. Russo that. We have a separate dispute with Ameriprise and
17 their counsel about these issues.

18 But the requirement there be a copyright notice in the GPL
19 license is contained in the provision dealing with distribution
20 of the source code. If you distribute the source code to a
21 third party, you must retain the copyright notice that is at
22 the very beginning of the source code file.

23 **THE COURT:** And you're saying you didn't give them
24 source code, you gave them object code?

25 **MR. ALAVI:** That's correct, Your Honor. So nothing

1 has been stripped out of the source code and then delivered to
2 any customers.

3 With respect to Ameriprise, what was delivered to
4 Ameriprise was the object code file, at least that's what
5 Ameriprise has been able to find on their systems. If the
6 source code was delivered to Ameriprise, it would have been
7 delivered as downloaded with the copyright notice attached.

8 There has never been by Versata an attempt to remove any
9 copyright notices from source code and then deliver it to its
10 customers.

11 Now, when I -- if you want me to put that into a
12 declaration, you know, it's upon investigation. I mean, we've
13 talked to the people involved, we've done our investigation,
14 and that's just not the way Versata used the XimpleWare source
15 code. Mr. Russo has a fundamental misunderstanding of what
16 Versata did with the XimpleWare software product.

17 **THE COURT:** So you're saying, "Whether what we did is
18 right or wrong remains to be seen, but what we did was use the
19 source code intact, stuck it in our program, made it into
20 object code, and sent it off"?

21 **MR. ALAVI:** No. No, Your Honor. When you go to the
22 website to download XimpleWare software, you can download both
23 the source code and the object code. It comes in object code.

24 **THE COURT:** Okay.

25 **MR. ALAVI:** What we delivered to Ameriprise was the

1 object code as downloaded from the site that XimpleWare uses to
2 allow people to download their software.

3 **THE COURT:** Okay.

4 **MR. ALAVI:** We did not take the software, modify it,
5 copy it, or incorporate it into any software that Versata uses,
6 and we certainly did not remove any of the copyright notices
7 from the source code that XimpleWare allows people to download.

8 **THE COURT:** Did you understand that to be the case?

9 **MR. RUSSO:** No.

10 **THE COURT:** If it were the case, and you don't have to
11 accept it as true, but if it were the case, are you less
12 concerned about what's going on here?

13 **MR. RUSSO:** I'm as concerned because the whole
14 intention of the GPL license and the whole way it works is that
15 any form of distribution has to include, and you can read it in
16 paragraph 3 that refers back to paragraph 1, you must include
17 the copyright notice. You must give attribution.

18 Put differently, if you're going to try to come within the
19 GPL rules, which they purport to do but they didn't, put that
20 to one side, if you're facially trying to do that, you have to
21 put on the distribution disk or other media, "This has in it
22 GPL-compliant software and it's from XimpleWare, and you can
23 get the source code here."

24 The whole rationale, and you read it at paragraph 3, that
25 says, "If you decide to do it, you have to follow the rules of

1 paragraph 1." The rules of paragraph 1 include using the
2 copyright notice. You must give the author attribution.

3 That said, they chose not to do it. In fact, the way
4 Ameriprise found out is they hired an expert, Dr. Collins, and
5 Dr. Collins went through the software and discovered, as a part
6 of his analysis, and it's in Docket 14-7, his report, there was
7 something like 361 instances of our software in some 700 of
8 their components. That's in the litigation file that they're
9 in litigation with Ameriprise from a sworn witness that's now a
10 part of this record in that Docket Number 14-7.

11 So I understand what Your Honor is trying to do. I'm not
12 trying to be difficult, but I do think they owe us the duty, if
13 they're going to do the right thing -- in fact, I think some
14 courts would say, "You have to actually get that software back
15 from those people. They shouldn't have it to begin with."

16 All of those customers, if they don't -- according to
17 them, "Well, this was a simple task. We sent a patch out. We
18 don't even use your software." Well, that software should come
19 back. All that software should be returned. That software
20 shouldn't remain in the hands of others where it can be
21 redistributed without a copyright notice. That's not the way
22 the rules work.

23 So that is our concern still.

24 **THE COURT:** Okay. I think I understand what you say
25 you've done and what you're concerned about them having done,

1 even if a lot of what he says is true. So tell me how you're
2 being irreparably damaged.

3 **MR. RUSSO:** So let me start with an analogy that's --

4 **THE COURT:** Well, yeah.

5 **MR. RUSSO:** -- applicable, if I could.

6 **THE COURT:** Yeah, an analogy if you have to.

7 **MR. RUSSO:** An analogy would be helpful, and then I'll
8 get to the point of where we're going with this.

9 We have in the United States, and have had for quite a
10 while, an open public library system. It's been diminishing
11 over time and it now seems to be replaced by a Google-based
12 public library where you can see parts of books, you can even
13 download.

14 **THE COURT:** I want to know where your irreparable
15 injury is because the rules that used to give you a
16 presumption, don't give you the presumption anymore.

17 **MR. RUSSO:** Understood, and I agree that's the law,
18 Your Honor. There's no question about that.

19 In this case what is true is some number of multiple
20 copies of our software are out there with no copyright notice
21 on them under some form of distribution that they've chosen to
22 make, which all of those other customers that have our software
23 and have multiple copies of it can choose to make multiple
24 copies just the way Ameriprise has done and said, "We're
25 innocent. We're innocent because we didn't know about any of

1 this stuff."

2 That's irreparable injury. We have lost control of
3 multiple copies that no longer even bear our copyright notice.

4 Had they put the copyright notice in and kept the
5 copyright notice in, at least we could say, "Those parties are
6 going to be as strictly liable as they are," putting aside all
7 the other defenses that might be asserted about whether this is
8 within the license or outside the license.

9 If you take a book author's copyright notice out and hand
10 out a bunch of books and take them into distribution, that
11 author has lost control of copies that others can say, "I
12 didn't see a copyright notice, so I just made more copies of
13 this stuff, and I can do it over and over again because I don't
14 see a copyright notice. And until I'm either enjoined or get
15 some actual notification from someone...."

16 Another alternative is they could give us their full list
17 of all the people that have gotten the software, and we'll send
18 out a notification to them, Your Honor. We'll send the
19 notification that says, "Make sure you put this notice onto
20 each copy of our software," and we'll make sure each of those
21 parties have done it.

22 They can't leave it out there in the open unresolved.
23 That's irreparable injury here, and it is a distinguishing fact
24 in this case that we have raised and they have not addressed in
25 any of their papers. We raised it in our declarations. We

1 said, "There is a loss of control from the lack of our
2 copyright notice being on the copies that you distributed."

3 Counsel's admitted as much. He just says, "Well, it's
4 object code so we don't have to do it. We don't have to use a
5 copyright notice."

6 **THE COURT:** All right. So what do you say?

7 **MR. ALAVI:** Your Honor, I think Mr. Russo's argument
8 is an interesting argument but it ignores the reality of how
9 enterprise software is distributed and used by Fortune 500
10 companies, and that's who we're talking about. We're talking
11 about Fortune 500 companies that received Versata Software, as
12 well as the XimpleWare software, pursuant to a master license
13 agreement that has restrictions on their ability to distribute
14 the software outside their enterprise.

15 So the idea that a company like Ameriprise, who has a
16 license agreement with Versata that prohibits their ability to
17 distribute the software that they have received to anyone else,
18 would suddenly distribute the XimpleWare software all over the
19 world, it's not believable.

20 And there's certainly no evidence that any of Versata's
21 customers, who all have agreements with Versata that restrict
22 their ability to use and distribute the software they've
23 received, are going to go out and distribute the XimpleWare
24 object code to the rest of the world. Not a shred of evidence
25 of it and it doesn't make sense given the types of customers

1 that we're dealing with.

2 You expect that Prudential who they've sued, Ameriprise
3 who they've sued, they've sued nine of our customers in a
4 corresponding patent case, are going to go out and --

5 **THE COURT:** All right. Tell me about that. I don't
6 know about that.

7 **MR. ALAVI:** Well, that's part of this case. There are
8 two cases on file. Mr. Russo has filed this copyright case --

9 **THE COURT:** Right.

10 **MR. ALAVI:** -- against Ameriprise and Versata. He's
11 also filed another case, a patent case, against Versata.

12 **THE COURT:** In this district?

13 **MR. RUSSO:** In this district.

14 **MR. ALAVI:** In this district.

15 **THE COURT:** Who has it?

16 **MR. ALAVI:** It's been assigned to --

17 **MR. TAMKIN:** Magistrate Judge Grewal, Your Honor.

18 **MR. ALAVI:** Grewal.

19 **THE COURT:** Is it going to stay with him?

20 **MR. RUSSO:** We've said that's fine with us. We don't
21 know if they'll agree with that.

22 **THE COURT:** And it's not just you?

23 **MR. RUSSO:** Right. It's different parties,
24 Your Honor.

25 **THE COURT:** Who's the patent case against?

1 **MR. ALAVI:** It is against Ameriprise --

2 **MR. RUSSO:** XimpleWare versus Ameriprise and a host of
3 their --

4 **MR. ALAVI:** I can tell you the names, Your Honor.

5 **MR. RUSSO:** -- customers.

6 **MR. ALAVI:** They've sued Pacific Life Insurance
7 Company, United Healthcare, Metropolitan Life Insurance
8 Company, the Prudential Insurance Company, Wellmark,
9 Waddel & Reed, and Aviva.

10 **THE COURT:** And that's a patent claim?

11 **MR. RUSSO:** Patent suit.

12 **THE COURT:** And all this stuff that you're worried
13 about the copyright is also patented?

14 **MR. RUSSO:** Yes, parts are patented, but the copyright
15 is broader on the software than the patent is on the particular
16 method that's implemented.

17 **MR. ALAVI:** So, Your Honor, when we talk about --

18 **THE COURT:** And which case was filed first, the patent
19 case or this case?

20 **MR. ALAVI:** The copyright case by minutes.

21 **THE COURT:** Same day?

22 **MR. RUSSO:** One was -- yeah, the same day, Your Honor.

23 **THE COURT:** Do you think those cases are related?

24 **MR. RUSSO:** We actually internally debated that, and
25 some of the back and forth that we had actually had at some

1 point with someone or several defendants was they were likely
2 going to move to stay that case anyway because the result was
3 they were going to go to the Patent Office and do what people
4 do in the Patent Office these days, which is to do some type of
5 reexam.

6 **THE COURT:** Right, but very often those cases don't
7 get stayed, as you no doubt know.

8 **MR. RUSSO:** I know. We debated internally whether
9 they should be consolidated. We, frankly, didn't do it as a
10 strategy. We did it as just a recognition that there's
11 probably going to be two separate tracks based on what happens
12 with the patent in the Patent Office just because of what
13 usually happens given the new Act. People do some
14 post-examination review. This patent has not been through a
15 post-examination review yet.

16 That said, Your Honor, I do want to address one thing that
17 I found entertaining, and I think you will -- you have or will
18 as well. They say they don't have to worry because we have a
19 master license. That's the very thing that they sued
20 Ameriprise over because Ameriprise apparently turned the
21 software over to a third party in India called Infosys
22 regardless of the master license, and that's their Texas
23 lawsuit for breach of the master license against Ameriprise.

24 So on the one hand they're here saying, "The master
25 license protects everything. We don't have to worry about a

1 thing." On the other hand, in that lawsuit they say,
2 "Ameriprise took the software and gave it to a bunch of
3 outsource parties in India to do a reverse engineer."

4 **THE COURT:** I just don't see how this case isn't a
5 small piece of the patent case. I don't know why it's here
6 separately from the patent case.

7 **MR. ALAVI:** Your Honor --

8 **THE COURT:** Because you've got your patent issues and
9 then you've got this issue. We're struggling to find some
10 irreparable injury. And you've got some theoretical
11 consequences that you're able to articulate. That plus 50
12 cents maybe will get you a cup of coffee. I don't know. But
13 your real issue, then, I take it, is going to be the patent
14 thing.

15 **MR. RUSSO:** It's actually not the way we see it,
16 Your Honor. The patent case is really a distinct set of
17 issues, very distinct set of issues.

18 We think the copyright case is one that if you were to
19 say, I know you can't, tomorrow, "Hey, let's go to trial on
20 this case," we could try this case tomorrow. We'd have to get
21 some discovery and evidence that we're entitled to from them
22 about exactly what they did, which Dr. Collins apparently has
23 and we'll subpoena him and get that; but at the end of the day,
24 once a commercial party takes software and engages in
25 distribution of that software, they have to strictly follow

1 some very strict rules that they didn't follow here. It's
2 really that simple.

3 I think you'll hear Ameriprise counsel agree, because
4 that's their position in the Texas lawsuit, that Versata did
5 not follow those rules; therefore, there is no license.

6 Now, here they say, "Hey, we're an innocent party so don't
7 tack us for anything"; but they're not also here saying, "We've
8 installed the patch." You would think if this patch has sort
9 of solved everything, they'd be here saying the same thing in
10 their paperwork, "Hey, we've installed the patch. No harm, no
11 foul. Leave us alone."

12 **THE COURT:** Well, I guess they're not really normally
13 at the same table.

14 **MR. ALAVI:** That's right, Your Honor.

15 **MR. TAMKIN:** We are not normally at the same table,
16 but in this case we are because the problem that Your Honor
17 pointed out, which is, if I may --

18 **MR. ALAVI:** I'll move over, Your Honor, to make some
19 room.

20 **MR. TAMKIN:** -- which is --

21 **THE COURT:** The record should reflect they're now at
22 the same podium.

23 (Laughter)

24 **MR. TAMKIN:** We are sharing a podium. Thank you.

25 There is no irreparable harm here because this is a

1 situation where in Ameriprise, in the practice of Ameriprise,
2 the allegations are, which would be the same for any customer,
3 that they received the DCM software and they use it, and use is
4 licensed. Use is nothing more.

5 The actual factual allegations in the case are that
6 Ameriprise uses it internally. That's in paragraph 60 of the
7 Complaint, 61 of the Complaint, as well as the only factual
8 allegations, if there are any factual allegations about
9 Ameriprise, it's that, that they internally use the software.

10 And that's the way it works. It's a product that is
11 not -- Ameriprise doesn't sell it. Ameriprise doesn't --
12 Ameriprise uses it to run its business, to manage a whole bunch
13 of financial advisers; but because of that, Ameriprise is only
14 using it.

15 So when Mr. Russo says, "Well, the fact that all these
16 people are using it and can distribute it and the copyright is
17 somehow lost because -- or the right to control it is lost,"
18 that's not really true from a use perspective by the ultimate
19 customers.

20 In the end of the day, I agree that many things were not
21 complied with with respect to the GPL. That's true, and I
22 agree with Mr. Russo about that; but that doesn't mean that
23 there's irreparable harm here in any way, shape, or form
24 because use is allowed.

25 Moreover, as set forth in Mr. Collard's declaration, which

1 is attached to our papers, you can go and download this to use
2 it today. Everybody in this courtroom can go and download the
3 product to use it today. There are restrictions on
4 distribution, but anyone can use it.

5 If anyone can use it, no one has -- and, frankly, not only
6 use it and modify it in accordance with the GPL, then there is
7 no lack of control or loss of control of the software.
8 Everybody gave that up on day one when one made it available.
9 You have to comply, but you can certainly use it and use
10 doesn't require any compliance.

11 **THE COURT:** And you're entitled, though, to have your
12 copyright trail along with it; is that true?

13 **MR. TAMKIN:** You are entitled to have your copyright
14 trail along with it, but that use doesn't really -- using it
15 doesn't implicate any of that because the point is, as
16 Your Honor pointed out, it's to trail along with it. It's not
17 going anywhere when I just use the software.

18 If I distribute the software, then, of course, that
19 copyright notice needs to be provided, the source code needs to
20 be provided, et cetera. But if I just use the software, and
21 that's what's, you know, alleged against Ameriprise, then there
22 is no copyright issue in terms of Ameriprise passing that on
23 because Ameriprise isn't distributing it. None of the
24 customers in this kind of a context, I wouldn't think, are
25 distributing it, although Versata's counsel would know more

1 accurately.

2 **MR. ALAVI:** And, Your Honor, if I may, I know you've
3 talked about the irreparable injury, let's talk about this
4 copyright issue.

5 Mr. Russo's claim is, "Oh, other people will distribute
6 the software." I've talked about why that's unlikely and
7 there's no evidence of it happening.

8 There's an evidentiary standard here. It's not just
9 argument of counsel. I mean, Mr. Russo has to demonstrate that
10 our customers who have XimpleWare are likely to distribute the
11 software, which he can't do.

12 But even beyond that, there's no irreparable injury
13 because XimpleWare can recover damages. They have, in fact,
14 sued Versata for damages for indirect copyright infringement.

15 When you have a damage remedy with a solvent defendant, it
16 is very difficult, very difficult to demonstrate irreparable
17 harm. There are ways you can do it, but not by standing up and
18 saying, "We think that Fortune 500 companies are going to take
19 software that they've received from Versata, are going to copy
20 it and distribute it to the whole world," without a shred of
21 evidence to indicate that, "and when we can turn around and sue
22 Versata for indirect copyright infringement and seek damages
23 for that problem."

24 **MR. RUSSO:** Your Honor --

25 **MR. ALAVI:** That is not an irreparable-injury-type

1 case.

2 And you have to question what the imminence is. Mr. Russo
3 has known about this since July. They filed their copyright
4 notice in September. Everyone knows in software cases that
5 when you file a copyright notice, you do it to gear up for
6 litigation.

7 He filed the lawsuit in November, and the only time he
8 raised the issue of a TRO was after Ameriprise set a subpoena
9 for hearing in State Court for their witness. And he sent us a
10 letter saying, "I'm not presenting my client for a deposition.
11 You get him once in all three cases; and if you don't, I'm
12 going to file this TRO." That's attached to our papers. And
13 that was almost a month after he filed this case.

14 If he thought there was an imminent danger, you would have
15 thought that he would have sought the TRO much earlier than he
16 did. This looks like more of an attempt to try to leverage
17 discovery.

18 And, remember, in a patent case, where you have patent
19 rules, where they have to deliver their infringement
20 contentions before we engage in discovery, he wants to bypass
21 all of that in that case, which has not been designated as
22 related and should have been, and take discovery on the
23 copyright and patent case on an expedited basis in this case
24 without giving my client or Ameriprise the opportunity to take
25 discovery, get written documents.

1 I don't even know what the discovery he wants is. He says
2 it's limited, but there's no description of what he wants.

3 So at the end of the day, without irreparable injury,
4 there's no TRO and there should be no expedited discovery. We
5 should get these cases consolidated, they should be designated
6 as related, and we should follow the rules.

7 **THE COURT:** I'm not suggesting that they should be
8 designated as related. I was asking the question. Please
9 don't think I'm inviting that to happen.

10 **MR. ALAVI:** Your Honor, we think it should be
11 designated as related, and I'll give you a good example why.

12 Ameriprise has filed a motion to dismiss this copyright
13 case on the basis that they are licensed. They filed literally
14 the exact same motion in the patent case. It's -- the license
15 that is a defense to this copyright case for Ameriprise is the
16 exact same defense to the patent case.

17 There is no reason why these two cases should be litigated
18 separately. Now, ultimately that's for the Court when they get
19 a motion -- when the Court gets a motion to decide, but we
20 think this should have at least been designated related. We
21 don't know why it wasn't, but it should have been. Same
22 parties. There's additional parties in the patent case. Same
23 piece of software. Same purported defenses.

24 **THE COURT:** All right.

25 **MR. RUSSO:** Your Honor, three things. One, I think

1 counsel will agree he misspoke when he said that the copyright
2 notice was filed in September. I think he meant the copyright
3 registration. That should be clear.

4 Secondly, Docket 14-7 is an important piece of evidence
5 well beyond a shred of evidence, declarations and briefing by
6 Ameriprise, including Dr. Collins.

7 **THE COURT:** Isn't that all hearsay to me?

8 **MR. RUSSO:** No, Your Honor. It's exactly --

9 **THE COURT:** It's in a different case; right?

10 **MR. RUSSO:** It is in a different case, but it's a case
11 that's been fully litigated against parties that are adverse in
12 which there's statements made under oath that there is actual
13 incorporation of our software in their software.

14 **THE COURT:** Well, I've been wondering about that. I
15 don't really think I get there, but I think most of what has
16 been presented to me is hearsay. That's what it looks like,
17 because it's a different lawsuit.

18 You're allowed in a case in a summary judgment proceeding
19 to file declarations and they're treated as evidence, but I
20 don't know that you can take those declarations from one place
21 and import them as evidence in another place. It's just not
22 clear to me.

23 **MR. RUSSO:** It's the exact software, Your Honor, that
24 we're talking about in this case and the exact issue with an
25 expert who has looked at this exact question because these

1 parties are exactly, even though they're both at the podium
2 now, they're exactly adverse on this question.

3 And that's the interesting part of this story here because
4 XimpleWare took time, and we did take time, we tried to get a
5 settlement with these guys for umpteen -- if I go back to the
6 original letter that said, "Hey, we'll file suit and seek an
7 injunction," it's well before this whole discovery issue.

8 We took cycles to try to get to a settlement with all
9 these corporate guys. This is a small company. It's a tiny
10 company. I mean, it's not anywhere near one tenth of 1 percent
11 of the size of either of these giants; and at the end of the
12 day, they didn't want to be in a lawsuit and they certainly
13 didn't want to be in two lawsuits.

14 And when the subpoena came in, it was another surprise.
15 Now we're going to be in three lawsuits. Okay.
16 Judge Manoukian the day before yesterday said, "Whatever
17 Judge Illston wants, in fact I'm going to see her next week,
18 just make it clear in the order. She can control the discovery
19 on all this because I don't want anyone to be taken advantage
20 of. Sooner or later" --

21 **THE COURT:** Tell him thanks a lot; will you?

22 **MR. RUSSO:** He said, "Sooner or later, Mr. Russo, you
23 know that you're going to have to have your client show up." I
24 said, "Of course."

25 We've been trying to negotiate a deal on this case, not on

1 every single case, on this case. "No, there will be no
2 discovery. We're really sorry. Until you get your turn,
3 you'll get your turn."

4 Now, at the end of the day I wanted to get back to a
5 point, which is, if we could do the expedited discovery, we
6 would go to trial if it was allowed by you; or if Judge Grewal
7 has more time and they want to stipulate that Judge Grewal will
8 handle everything, I think he'll hold two separate trials
9 because I do think the copyright case can go to trial much
10 faster than the patent case.

11 And I do think, notwithstanding what they're saying,
12 somebody of all these litigants is going to file something in
13 the Patent Office because it has become a standard of care for
14 defense counsel to go to the Patent Office in the new world of
15 the new Patent Act, and there's going to be probably a year or
16 two delay in those Patent Office proceedings. That's just the
17 way it works in my experience.

18 And, so, we can do the copyright case and try that; and if
19 it's with Judge Grewal, we're happy with that. We're not
20 against it. At one point we said, "Let's go before
21 Judge Cousins even," because we know district judges are busy
22 here. And they said, "Well, we'll think about it," and they
23 thought about it and changed their mind.

24 We're happy to be before Your Honor as well if we want to
25 go in the other direction. I think Judge Grewal probably has a

1 lot more time than you do just based on how quickly we've seen
2 other cases go in front of him.

3 **MR. ALAVI:** Your Honor, if I may, and tell me to stop
4 talking. I know when to stop talking when a judge tells me to
5 stop.

6 But the subpoena in the Texas case, we have a trial set in
7 that case in February. We need to conduct discovery; and
8 because of the defenses that Ameriprise has raised on this
9 XimpleWare software, we need the deposition.

10 And, so, the idea that we should consolidate the discovery
11 in these three cases and force defendants in a copyright case
12 and a patent case to go through expedited discovery because
13 there's a February trial setting doesn't make sense.

14 Mr. Zhang from XimpleWare is just going to have to be
15 deposed more than once, and we will take great care in the
16 deposition on Friday to limit it to the issues in the
17 State Court case.

18 I keep hearing about the hearsay that Mr. Russo attached
19 to his motion. He pointed out, for example, the expert
20 declaration from Ameriprise. One thing Mr. Russo didn't attach
21 would be our summary judgment response in that case where we
22 have an expert from M.I.T. who disagrees with Mr. Collins, who
23 fundamentally disagrees with Dr. Collins' arguments that the
24 XimpleWare software is incorporated into the Versata software.

25 So that's the problem with hearsay and that's the problem

1 with selective hearsay. The reality is --

2 **THE COURT:** That's the problem with experts.

3 **MR. ALAVI:** That's true, but we didn't add all that to
4 our response because XimpleWare doesn't pass go. There is no
5 irreparable injury here. There is no imminent harm. They have
6 a remedy for damages and this TRO should be denied on that
7 basis.

8 **MR. TAMKIN:** Your Honor, if I may follow up on two
9 points as well, which is, number one, that Judge Manoukian's
10 order is actually attached -- or proposed order that the
11 parties have agreed to is actually attached.

12 **THE COURT:** Oh, it is?

13 **MR. TAMKIN:** It is the proposed order that the parties
14 have agreed to. I want to make clear, however, it was
15 Ameriprise's petition and, so, only Ameriprise and XimpleWare
16 have agreed to this form of proposed order. It is
17 Document 39-9.

18 And that that makes clear in Section 3 of the order, I
19 believe: (reading)

20 "The scope of the questioning at the deposition," and
21 I'm reading verbatim, "is limited to the matters relevant
22 to the Texas action pending in Travis County."

23 In other words, Judge Manoukian made it very clear that,
24 "This is not going to relate to the federal cases; I'm not in
25 any way getting involved in that. And if Judge Illston" --

1 **THE COURT:** By the way, I'm sorry to interrupt, did he
2 sign whatever that order is?

3 **MR. TAMKIN:** He has not. He has not signed it. He
4 has -- this was what he ordered at the hearing, though, asked
5 the parties to submit a proposed order. The parties then
6 thereafter worked together to agree that this, in fact, is what
7 it was.

8 **MR. RUSSO:** We fully expect him to sign it,
9 Your Honor.

10 **THE COURT:** Okay.

11 **MR. TAMKIN:** I don't want to misrepresent. We do as
12 well.

13 More importantly, he also states, not that Judge Illston
14 should do whatever she's going to do, but that all the
15 foregoing is without prejudice to the decision of Judge Susan
16 Illston in the pending Federal Court action entitled XimpleWare
17 versus Versata, et al., to stay, modify, or otherwise change
18 the deposition.

19 So, in other words, if this Court is going to order
20 expedited discovery, then if there's a need for coordination,
21 there is a need for coordination. But right now, as it stands,
22 we have a deposition scheduled for this Friday, both Mr. Alavi
23 and myself are here ready to take it, and that is going to go
24 forward on just the issues in the Texas case.

25 **THE COURT:** And the trial in Texas is in February?

1 **MR. TAMKIN:** February 24th we have -- and we have,
2 under Texas, Mr. Alavi can explain better, a Rule 11 letter
3 which requires us to get -- it's a different Rule 11 -- all of
4 our discovery, already named witnesses, completed by
5 December 20th.

6 **MR. ALAVI:** We have a -- so in Texas Rule 11 is a
7 procedure for stipulations. It's not Federal Rule 11. In
8 order to get the February trial setting, because there was a
9 continuance, the parties agreed to complete the discovery of
10 previously identified witnesses by December 20th, and the
11 XimpleWare corporate rep is one of those witnesses.

12 **MR. TAMKIN:** Right.

13 So -- but on the question of expedited discovery, one of
14 the things that XimpleWare needs to show is that there is good
15 cause for expedited discovery. Preliminary Injunction alone is
16 not good cause. What there has to be is good cause to do
17 expedited discovery ahead of the scheduled discovery in the
18 case.

19 And what there's been argument is: We need discovery. We
20 need discovery like in any case you need discovery. But here
21 there's no immediacy to this, so the Court needs to also look
22 at the immediacy prong and the irreparable harm prong. What's
23 the -- what is the rush here? What is the rush to do expedited
24 discovery? Simply because you file a motion doesn't mean you
25 do expedited discovery.

1 The last point I want to make is with respect to the
2 allegations and this hearsay issue of Dr. Collins. Whether
3 it's hearsay or not hearsay, what Dr. Collins says, and I
4 certainly agree with him, is that all of -- is that the
5 XimpleWare software is incorporated into the object code.

6 Whether that's true or not, however, doesn't answer the
7 question of whether, for example, Ameriprise copied it,
8 distributes it, things like that. That issue still hasn't been
9 proven. Simply because Dr. Collins says it's incorporated
10 doesn't mean that it is -- that Ameriprise is in violation of
11 the GPL. So there's no success prong. There's no analysis to
12 that prong. It's simply one fact, which is in fact hearsay.

13 So we don't think that a TRO is warranted because there's
14 no immediate or irreparable harm. Certainly no likelihood of
15 success. We actually filed a motion on this yesterday because,
16 in fact, with respect to Ameriprise we are licensed because we
17 don't do anything wrong.

18 And, in fact, Section 4 of the GPL, and this is quoted in
19 our papers, specifically says even if Versata is not licensed,
20 the customers of Versata still are as long as they comply with
21 the GPL; and there's no facts in the record that say that
22 Ameriprise has not satisfied the terms of the GPL.

23 **MR. ALAVI:** And, Your Honor, if I may, to help
24 Mr. Tamkin out, I don't think he reads paragraph 4 strongly
25 enough. Paragraph 4 of the GPL says that if Versata, licensee,

1 breaches its agreement and the agreement becomes void, anyone
2 who received the software from Versata continues to be
3 licensed.

4 I mean, it is -- I think that motion to dismiss, when you
5 get to it, will be a simple matter. I'm surprised that -- I'm,
6 quite frankly, surprised that XimpleWare sued any of the
7 customers given the clear strength of that language in
8 paragraph 4, but there's no doubt that the customers are
9 licensed even if Versata allegedly breached the GPL license.

10 **MR. RUSSO:** Your Honor, just to be clear, and it's in
11 our papers, Ameriprise does its computing not just with its
12 employees but with many, many independent contractors that
13 carry an Ameriprise franchise. These are nonemployees.

14 They like to say it's all internal usage. In fact, the
15 declaration attaches their SEC filing where they say, "We have
16 7400 independent franchisees or contractors." In other words,
17 they're nonemployees.

18 When they say it's internal, they're somehow saying the
19 enterprise can include all of these other people that get the
20 benefit of the software; and that, to me, is hocus-pocus here.
21 That is not a truthful statement about how the law works. The
22 law doesn't let you as a company say, "Your employees can use
23 Microsoft Word; and, oh, we happen to have a few hundred
24 thousand contractors we'd like to treat as people who are under
25 our license." That's not the way it works and that's in the

1 record here.

2 They seem to be playing with, "Hey, it's all internal use
3 so, therefore, we're protected." That's not true. It's not
4 all internal use, and we've got the evidence in the record on
5 that.

6 On the discovery question, if I may, because they've taken
7 a lot of time, it seems to me, particularly if there's going to
8 be a Preliminary Injunction hearing and you're going to get a
9 lot more time to look at the paperwork, we should have at least
10 one deposition per side in the copyright case.

11 And if you want to expedite it under Rule 65 to do the
12 trial on the merits, we'll agree to that as well. We're not
13 here trying to drag our heels at all. We're not -- we're ready
14 to say, "Give us some discovery and we'll go to trial on this."

15 We think it's a pretty blatant willful infringement given
16 the notice. Now, they patch, they purport to patch this stuff
17 without saying anyone's actually installed the patch, without
18 saying that anyone's actually returned the software, without
19 saying that anyone's deleted the software, without giving us
20 the names of these people.

21 Again, if they want to give us the names, we'll send the
22 copyright notice out and ask that those parties give full
23 notice and put notice on all copies and confirm that they're
24 not using them anymore.

25 We actually think it's kind of a ruse because the truth of

1 the matter is, for the 25,000 transactions per hour that they
2 advertise their software can do, it can only do it with the
3 XimpleWare software. There's nothing else available on the
4 market, to our knowledge, that can do that volume of
5 transaction processing.

6 So it's simple enough to send a notice saying, "Please do
7 this." Whether your customers do it or not is a whole nother
8 question. The fact that Ameriprise is not here even with
9 counsel saying, "Yes, my client's doing it, my client's done
10 it, or it will get done by Friday," that alone is telling,
11 Your Honor.

12 So it's nice and it's interesting that the CEO says,
13 "Okay. I'm sending it out. I've sent out a patch. And, by
14 the way, this process, because it may take time for people to
15 do it," the inference is very clear. People are not coming
16 back and confirming that they have done it.

17 So simply by waving his hand -- indeed initially counsel
18 said to me, "Oh, it was only Ameriprise that ever got this
19 software from XimpleWare." That was his representation. It
20 makes no sense to us.

21 **MR. ALAVI:** Hold on, Your Honor. I have never spoken
22 to Mr. Russo. I have never spoken to him, and that is just not
23 true.

24 **MR. RUSSO:** Okay.

25 **MR. ALAVI:** And --

1 **MR. RUSSO:** I'm sorry if I --

2 **MR. ALAVI:** -- I guess I've heard a lot of hyperbole,
3 I've heard a lot of speculation, but that is just not an
4 accurate statement. You and I have never spoken before today.

5 **MR. RUSSO:** Well, then there must have been an email
6 exchange because something happened between the two of us in
7 which a bunch of other stuff happened.

8 **MR. ALAVI:** That is just --

9 **MR. RUSSO:** We've had communications, Your Honor.
10 Perhaps it was by email.

11 But I have to say that it's far more than XimpleWare and
12 Ameriprise and Versata. There are other people who have gotten
13 the software as well, and they've apparently sent this patch
14 out. That's how you started this hearing.

15 It seems to me the right outcome is either they send the
16 copyright notice out; or they give us the list of the
17 particular people and the particular email addresses that
18 received the software, and we'll send the copyright notice out
19 and say it's pursuant to either a stipulation or an order, and
20 we will avoid irreparable injury here.

21 **MR. ALAVI:** Your Honor, there is no irreparable
22 injury. Mr. Russo can't talk about it. It doesn't exist.

23 The idea that we should go to trial on an expedited basis
24 in this case where there are issues as to whether or not
25 XimpleWare even owns the copyright, they've had other people

1 work on the software and develop the software, and there's
2 going to be issues about the validity of their copyright
3 registration when there's a patent case pending and expedited
4 discovery is going to be used to circumvent the proper due
5 course of the discovery in that patent case.

6 They decided to file two cases. They wanted to pursue
7 litigation. We can have our Rule 26 conference. We haven't
8 even answered yet. Last week we received for the first time a
9 request to waive service. There are other defendants in the
10 patent case.

11 We should do discovery in these two cases the way
12 discovery is normally done; but the idea that we should do
13 expedited discovery and essentially litigate the patent and
14 copyright case, because that's what we're talking about, in 30
15 to 45 days prejudices the defendants and there's no reason to
16 do it, none whatsoever. All you've heard is speculation,
17 hyperbole, and hearsay and not a shred of evidence of
18 irreparable injury.

19 **THE COURT:** Are we all done?

20 **MR. RUSSO:** I think so.

21 **MR. ALAVI:** Yes, Your Honor.

22 **THE COURT:** Okay. Well, I'll get you a written order.
23 I'm intending to deny the TRO because I don't see at this time
24 irreparable injury.

25 I'm going to take note of the representations that have

1 been made in the papers about the fact that Versata has no new
2 customer sales of DCM and does not anticipate closing any
3 additional sales during the 2013 calendar year; that all
4 references to XimpleWare of the versions of DCM that have been
5 created have been removed and a patch has been created which
6 will be sent to all the customers; all those representations
7 I'm taking as true and I'm going to require, as time goes by,
8 that I get proof it did, in fact, happen.

9 I think some of the points Mr. Russo has made about
10 getting information about who they were sent to and whether it
11 was done or whether it's been implemented are perfectly
12 appropriate, and they need to be followed up on; but I don't
13 see that any of that warrants a TRO at this time.

14 I will say this: If I keep this case, if it goes to
15 Judge -- it wouldn't go to Judge Grewal. If it were to, that
16 would be terrific; but if it didn't, I am easily able to try
17 this case in the springtime. So we can go to trial just as
18 fast as it's ready to go to trial, but I'm not going to issue a
19 TRO at this time.

20 I'll get you a written order to that effect.

21 **MR. RUSSO:** All right. Thank you, Your Honor.

22 **MR. ALAVI:** Thank you, Your Honor.

23 **THE COURT:** Thank you.

24 **MR. ALAVI:** May we be excused?

25 **THE COURT:** Oh, and with respect to the discovery, I

1 will take another look at that. At this time I don't foresee
2 granting the request that's been put in these papers. It's way
3 open-ended and I'm not sure that it's properly targeted to get
4 the information that you would want.

5 If the witness needs to give more than one deposition,
6 that is just, frankly, life. It happens sometimes. But if
7 there is targeted, specific information that needs to be
8 presented on an expedited basis in this one case, you can make
9 an appropriate request and I'll take a look at it.

10 **MR. RUSSO:** All right. Thank you, Your Honor.

11 **MR. ALAVI:** Thank you, Your Honor.

12 **MR. TAMKIN:** Thank you.

13 **THE COURT:** All right. Thank you.

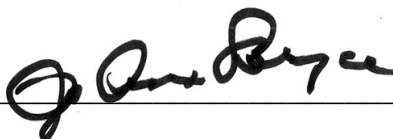
14 (Proceedings adjourned at 11:57 a.m.)

15 ---oOo---

16 **CERTIFICATE OF REPORTER**

17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled matter.

19
20 DATE: Thursday, December 12, 2013

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22
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24 _____
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